IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8452 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KASAMBHAI MOHAMADBHAI MANSURI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 8452 of 1993

MR AB Munshi for AJ PATEL for Petitioner No. 1

..... for Petitioner No. 2-4

Mr. H.C. Patel, AGP for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 11/12/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Munshi for the

petitioners and Mr. H.C. Patel, learned AGP for the respondents. It was submitted by the learned advocate Mr. Munshi on behalf of the petitioners that the lower authorities right from the Mamlatdar to the Deputy Secretary, Revenue Department, State of Gujarat has decided the matter without deciding the specific contention raised on behalf of the petitioners as to whether the land in question is belonging to the Government or is belonging to the petitioner. He submits that the specific contention raised on behalf of the petitioners before the lower authorities [as per page 31] that the proceedings under section 61 cannot be initiated against the petitioners unless and until the matter is examined under section 37(2) of the Bombay Land Revenue Code but that contention has also not been taken into account by the revisional authorities. He also submits that without examining and considering the aforesaid contentions raised on behalf of the petitioner, the revisional authorities have come to the conclusion that the Government land has been encroached by the petitioners and, therefore, there is no need to examine the matter under section 37(2) of the Bombay Land Revenue Code. According to his submission, such observations made by the revisional authorities are apparently a basic error because in the order of the Mamlatdar dated 5th October, 1989, it has been clarified that initially the land was of the ownership of the petitioner but because of the relinquishment or resignation of the rights, the land in question has vested in the Government upon which the allegation of encroachment has been made against the petitioners. Therefore, considering this aspect, the below authority has not examined important question of law raised by the petitioners that the proceedings under section 61 of the Bombay Land Revenue Code cannot be initiated by the revenue authorities without first examining the claim of ownership made by the petitioners that the land in question is belonging to the petitioners and not to the Government. Without considering and examining such aspects, the revenue authorities have concluded that the petitioners have encroached upon the Government land and, therefore, proceedings under section 61 of the Code were directly initiated against the petitioners. According to my opinion, when the specific contention has been raised by the petitioners before the lower authority and when it has been found from the record that initially the land was belonging to the petitioner but because of the relinquishment of rights, the land has vested in the Government, though the petitioners are not admitting this fact of relinquishment of his rights and vesting of the land in the Government as a consequence of such relinquishment of rights.

I have perused the orders passed by the lower authorities. According to my opinion, since the dispute or objection has been raised by the petitioner before the revenue authorities that the land in question is not belonging to the Government but is belonging to the petitioner, before initiating proceedings under section 61 of the Code, it was the duty of the respondent authorities to first decide the controversy about ownership of the land in question. The contention raised by the petitioners before the revenue authorities was that the lands in question are of their private ownership and not belonging to the Government. Therefore, it ought to have been decided first as to whether the lands in question are belonging to the Government or not before initiating the proceedings under section 61 of the Code. Alleged relinquishment of their rights and vesting of the land in question in the Government as a consequence of such alleged relinquishment of rights has also been disputed by the petitioners. Inspite of such specific contentions, the land has been treated as a Government land by the concerned authorities. It was submitted by the learned advocate Mr. Munshi that till this date, the petitioners are in possession of the land in question and they are cultivating the same.

Learned advocate Mr. Munshi has relied upon the decision of this court in case of Aher Naan Vijanand versus State of Gujarat & Anr. reported in 1990 GLR page 1161, relevant observations made by this Court in para 3 of the said decision are reproduced as under:

"3. There is considerable substance in these contentions. I called upon the learned Asstt. Government Pleader who appeared for the respondents to point out whether the petitioner had put forward title to this land or not. He fairly stated that it was so. However, he stated that both the Courts have concurrently found that the petitioner had encroached upon the Govt. land and, therefore, the order under section 61 was rightly passed. This submission cannot be accepted for the simple reason that in proceedings under sec. 61, title to Govt. property cannot be in dispute and if alleged encroacher alleges that he is not an encroacher, question can be examined under section 61. But in the present case, when admittedly, the petitioner had put forward a case of his ownership on this alleged encroached land, the question land belonged to the petitioner or to

> the Government would directly arise for consideration. Such a dispute has to be resolved not in proceedings under sec. 61 but in proceedings under sec. 37(2) of the Code. Consequently, on the facts of this case and on the contentions of the petitioners, proceedings under sec. 61 are found to be totally misconceived and without jurisdiction. On this short ground, the impugned orders at Annexures "D" and "E" passed by the Mamlatdar and as confirmed by the Special Secretary, Revenue Department are quashed and set aside. It would be open to the Mamlatdar to initiate proceedings under section 37(2) and to decide, after giving an opportunity to the contesting parties to lead evidence as to whether the alleged encroached portion of the land belongs to the petitioner or belongs to the Government and then pass appropriate order in accordance with law. Rule is accordingly made absolute with no order as to cost. Ad-interim relief granted earlier will stand vacated. "

Therefore, in the facts and circumstances of the case and also considering the aforesaid decision of this Court, according to my opinion, the orders passed by the below authority from Mamlatdar, Jagadia dated 5th October, 1989, order passed by the Deputy Collector, Rajpipla dated 26th December, 1989 and the order of the Collector dated 9th August, 1991 and the order passed by the revisional authority dated 16th February, 1993 are required to be quashed and set aside without expressing any opinion on the merits of the matter for enabling the revenue authorities to first consider the question about the ownership of the land in question as to whom the land in question belonged.

In the result, present petition is allowed. The orders passed by the authorities namely Mamlatdar, Jagadia dated 5th October, 1989, order passed by the Deputy Collector, Rajpipla dated 26th December, 1989 and the order of the Collector dated 9th August, 1991 and the order passed by the revisional authority dated 16th February, 1993 which are at annexure "D" to Annexure "G" are hereby quashed and set aside and without expressing any opinion on the merits of the matter, it is hereby directed to the Mamlatdar, Jagadia to initiate the proceedings under section 37 (2) of the Bombay Land Revenue Code and to decide the matter after giving opportunity to the contesting parties to lead evidence as to whether the alleged encroached portion of the land in

question is belonging to the petitioners or is belonging to the Government and to pass appropriate orders in accordance with law. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Dt. 11.12.2002. (H.K. Rathod,J.)

Vyas